Petition not printed

AUG 4 1950
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 171

GUNNAR A. LARSSON,
Petitioner,
vs.
COASTWISE LINE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT COASTWISE LINE IN OPPOSITION.

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OPINIONS OF THE COURTS BELOW.

The two opinions of the District Court are reported at 1950 A.M.C. 176. They appear in Volume I of the Record at pages 20 and 26, respectively.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 181 F. (2d) 6. It appears in Volume II of the Record at page 120.

JURISDICTION.

Libelant's action was brought under the Jones Act (46 U.S.C. 688) and under the general Admiralty and Maritime jurisdiction of the District Court (28 U.S.C. 1333). This Court's jurisdiction rests on 28 U.S.C. 1254.

The judgment of the Court of Appeals was filed on March 22, 1950 (R., v. II, p. 124). Petition for rehearing was denied on April 14, 1950 (R., v. II, p. 125). The mandate was issued April 25, 1950.

QUESTIONS PRESENTED.

1. Whether both Courts below erred in concluding from the facts of this case that respondent should be exonerated.

2. Where the negligence of the winch driver, an employee of an independent contractor, was imputable to respondent as shipowner.

STATEMENT.

This case involves an injury allegedly suffered by petitioner Gunnar A. Larsson, a merchant seaman, while on board the SS "Justo Arosemena" as a member of its crew on October 5, 1947, while the vessel was moored in the harbor at Shanghai, China. At the time of the alleged injury the vessel was owned by the United States of America and operated, maintained, managed and navigated by respondent Coast-

wise Line under a bareboat charter. Coastwise Line had, in turn, entered into a per diem charter with the Board of Supplies, Executive Yuan, of the Republic of China, an independent contractor which arranged for its own stevedoring operations. Larsson was injured while he was oiling a winch which was thrown into operation by a Chinese stevedore in the employ of the aforementioned Board of Supplies. The United States was originally joined as a respondent but was subsequently dismissed at the hearing. The District Court dismissed petitioner's first cause of libel for damages and awarded him an allowance for maintenance and cure on the second cause of libel and directed that each party pay his own costs. The record shows that petitioner was an experienced seaman (oiler) 32 years of age (Tr. 50). At the time of the accident he had had nineteen years of sea experience and held a Swedish engineer's license (Tr. 67) and had sailed on American ships for some three years (Tr. 67, 68). One of the duties of an oiler on American ships is to oil and grease winches (Tr. 72, 52). This work is done in the course of loading or discharging the vessel. The "Justo Arosemena" was equipped with five sets of steam winches, ten in all (Tr. 53). The winches were oiled in six places and there were grease cups on each winch in approximately twenty places (Tr. 54). During the nine months' voyage the total time occupied in loading and discharging operations involved approximately three months (Tr. 33, 34). During the course of oiling and greasing operations, which were conducted hourly,

these winches, according to petitioner's own testimony, had been oiled and greased not less than 10,000 times by the members of the crew concerned with their operation. By mathematical computation—there being six places to oil and twenty to grease on each winch—at least 260,000 individual operations were performed on the vessel's winches during the course of her voyage, and despite the complaints of petitioner as to the stevedores' conduct not a single other accident was suffered in connection with the winches during the entire voyage (Tr. 32, 33). The petitioner himself oiled or greased the winches at least 1,000 times (Tr. 70), which would require 26,000 individual greasing operations.

It took petitioner between forty-five minutes and an hour to grease all the winches (Tr. 73); or to oil them alone, from ten to fifteen minutes (Tr. 74). On October 5, 1947, the day of his injury, Larsson serviced the winches during the stevedores' lunch hour, and the winch at which he was injured was the last to be worked upon by him on that round. When he came up to the winch the Chinese winchdriver was warming it up (Tr. 80). Petitioner did not speak to the winchdriver but started to work on the winch after the winchdriver had given his "O.K." Petitioner said nothing whatever to the winchdriver, merely showing him his grease gun before he commenced work. Petitioner was working on the last grease cup when the winchdriver started up the winch, causing the grease gun to hit him on the wrist. Petitioner did not know whether he had ever seen this particular winchdriver

before (Tr. 81) and no one aboard the vessel could identify this particular winchdriver as being the one who had carelessly handled a winch before (Tr. 81).

Each of the vessel's ten winches is equipped with an individual steam shut-off valve which, if closed down prior to working on the winch, would completely immobilize the winch and make it entirely safe for anyone to work on or about it (Tr. 39, 111, 112). After the steam valve is closed the winch cannon thereafter be operated until the steam valve is reopened. The use of this valve is a proper way of immobilizing a winch and it is located within three feet of the winch's throttle (Tr. 112). It takes eight turns to completely close the valve which can be accomplished in less than a minute (Tr. 112). Upon the opening of the valve the winch can be put back into immediate operation (Tr. 113). It was within the discretion of the individual oilers as to whether they should completely immobilize any particular winch (Tr. 115). Once the valve had been closed the winchdrivers could not again start the winch (Tr. 112). The winches were in good order and condition and there was nothing the matter with them (Tr. 36).

The Court of Appeals in affirming the decision of the District Court summarizes the foregoing facts and in commenting upon the District Court's findings states:

> "The district court found that appellant [petitioner here] knew about the shut-off valve on the winch, and, being a man of experience, must have known that by its use, his job of oiling the

> winch would be rendered absolutely safe. The court held that, under the foregoing circumstances, appellee [respondent here] could not be held to be negligent, merely because it did not order appellant to use the valve."

Petitioner urges that the Court of Appeals refused to consider his present contention that the shipowner should be liable for negligence of an employee of the Republic of China, an independent contractor, and whose employees were not fellow servants of petitioner (Pet. 3-4). The Court of Appeals in its opinion, Page 2, states petitioner's contention before that Court as follows:

> "Appellant [petitioner here] contends that the ship was unseaworthy because of the existence of an unsafe place to work, created by the incompetence of Chinese stevedores, and that the shipowner was liable for the damages resulting from his injury, regardless of any actual negligence on its part: that apart from the question of unseaworthiness, the shipowner could not delegate the duty of providing a safe place to work and was, accordingly, because of the employment of incompetent stevedores, liable in this case; that the shipowner had knowledge of the fact that the place appellant was working was unsafe because of the negligence of Chinese stevedores; that it took no steps to eliminate this condition; and that it was, therefore, actually negligent and liable for damages caused by the negligence of the Chinese winch driver, who commenced operation of the winch while appellant was oiling it."

We respectfully submit that while now somewhat differently stated, petitioner's present contentions were fully considered by the Court of Appeals on the appeal and on his petition for rehearing, which were denied.

ARGUMENT.

The petitioner would have this Court believe that the shipowner entered into a per diem charter with the Republic of China to insulate itself from liability for acts of employees of the Republic of China. Per diem charters were a very common form of commerce long before the Jones Act was heard of and there is nothing unusual or uncommon about them. They are not entered into for the purposes claimed by petitioner nor do they represent attempts on the part of the shipowner to avoid his responsibilities through subterfuge as petitioner so erroneously claims. Petitioner in support of his ill-conceived theory relies principally on the case of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 Sup. Ct. 872 (1946). In view of the tendency of all seamen to claim the *Sieracki* decision in support of their positions, irrespective of whatever they may be, we respectfully submit that this decision does not of necessity guarantee a recovery to all seamen in any amount, based upon any possible claim, no matter how fantastic. The Jones Act has not as yet become an unqualified all-risk policy of unlimited insurance running in favor of all seamen claimants under all possible conditions. There

is no controversy here over the long-settled rule that a shipowner is under a non-delegable duty to provide his seamen with a seaworthy ship and safe appliances. It is equally undisputed that the shipowner cannot escape liability for breach of this obligation on the ground that a seaman's own negligence contributed to his injury. The decision below does not rest, as petitioner asserts, upon a refusal to apply these established rules. It is based, rather, upon the clearly stated and amply supported conclusion of two courts that respondent did not fail in any duty to supply a safe place for the libellant to work. Whether or not the place in which petitioner worked was a safe one is a question of fact. *Mahnich v. Southern SS Co.*, 321 U.S. 96, 98. We submit that the concurrent resolution of this question by both lower courts is not an appropriate subject for review by this Court. *Just v. Chambers*, 312 U.S. 383, 385.

In *Seas Shipping Co. v. Sieracki*, supra, Sieracki was employed by an independent stevedoring contractor which was under contract to the Seas Shipping Co. to unload one of its vessels. The libelant was operating a winch and when a load on the boom was being lowered the shackle supporting the boom broke at its crown causing the boom and tackle to fall and injure him. The Court there held that the shipowner's obligation of seaworthiness extended to longshoremen. As noted, that decision was based upon facts far different than here. In the *Sieracki* case the ship's gear, while being used in the manner intended, carried away. We have no such problem even remotely

touching upon such facts here. The policy of the *Sieracki* decision—"That for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections" (328 U.S. at 99)—stems from a recognition that the stevedore shares with the seaman the risks of the ship's unseaworthiness. These risks, the Court pointed out, are ones which the stevedore's employer "ordinarily has neither right nor opportunity to discover or remove * * * and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them. If not, no such obligation exists unless it rests upon the owner of the ship."

In the instant case nothing broke or carried away nor was there insufficiency, unseaworthiness, or failure in gear or equipment. Petitioner's only possible contention is that the winch driver, an employee of an independent contractor, started a winch a second or so too soon. The Court of Appeals in considering this matter held:

> "From a review of the record, it is our conclusion that the findings of the district court that appellee owner [respondent here] was free from negligence as sustained by the evidence. Moreover, there was no evidence to sustain the claim that the ship was unseaworthy or that there was failure to supply a safe place for appellant to work so as to place any liability in respect of the winch operation upon the shipowner."

Petitioner has cited *Meyers v. Pittsburgh S.S. Co.*, 165 Fed. (2d) 642, C.C.A. 6 (1948). The Court in that case refused to extend the *Sieracki* decision as here desired by the petitioner, stating:

> "We face the fact, however, that the *Sieracki* case dealt with injuries resulting from lack of seaworthiness of the vessel upon which stevedores were employed, while here no question of the vessel's seaworthiness arises. We bow, of course, to controlling authority, yet sense no obligation to extend a doctrine, however logical such extension may seem, which distinguished dissenting Justices have characterized as novel, creating new rights in maritime workers hitherto unrecognized by maritime law or statute and without warrant in history or precedent, nor with support in policy or practical needs, and so consider the obligation of the ship in the present case not as absolute, but as one based upon fault, if in consideration of the record substantial evidence appears pointing to fault."

Petitioner finally relies upon a vague and supposed public policy, for which he cites no authority, as standing for the proposition for which he contends. We know of no such public policy that imposes liability in the absence of unseaworthiness, fault or negligence upon the part of the shipowner.

The remaining authorities cited by petitioner and not heretofore commented upon are entirely irrelevant to the issue before this Court. In passing, we might state that we agree with the conclusions of such cases that a shipowner is liable for an injury

caused to a seaman through the negligence of a fellow servant.

Petitioner would have this Court believe there is something new, unique or novel in the time-honored defense of independent contractors. It must be conceded that the general rule is that an employer is not ordinarily liable for the negligence of an independent contractor or his servants, but nevertheless, petitioner urges that the negligence of the winchman, an employee of an independent contractor in this case, is imputable to the shipowner. As an exception to the general rule of non-liability for negligence of an independent contractor, a number of courts have held that one "who employs an independent contractor to do work which is inherently dangerous to others is subject to liability for bodily harm caused to them by the contractor's failure to exercise reasonable care to prevent harm resulting from the dangerous character of the work." Petitioner, misconceiving the nature of this exception, relies upon it here.

The cases applying the exception invariably emphasize the fact that the work involved must be "inherently" or "intrinsically" dangerous. The rule is one designed to prevent one who would work with extremely risky materials or processes from delegating his responsibility for the extraordinary precautions required. It has, accordingly, been sharply limited in its application. See Prosser, *Torts* (1941), p. 488.

Volume 27 of American Jurisprudence "Independent Contractors—Liability of Employer" discloses

the following correct statement of law on pages 504, 505 and 506:

> "Generally—Although in some early cases it was thought that the doctrine of respondeat superior applied to the relation between an employer and an independent contractor, the authority of these few cases was soon overwhelmed by many decisions promulgating the general rule that an employer is not liable for the torts of an independent contractor or the latter's servants. This rule of the non-liability of an employer is based upon the theory that the characteristic incident of the relation created by an independent contract is that the employer does not possess the power of controlling the person employed as to the details of the stipulated work, and it is, therefore, a necessary judicial consequence that the employer shall not be answerable for an injury resulting from the manner in which the details of the work are carried out by the independent contractor. The general rule has also been said to rest upon the ground that a contractor, pending the performance of the work, is, to a certain extent, substituted for the person for whom the work is to be performed. However, the real basis for the rule seems to be public policy."

In the case of *Williams v. Fresno Canal and Irrigation Company*, 96 Cal. 14, decided in 1892, the Court held:

> "When A makes an independent contract with B, by which the latter is to do for the former a piece of work in itself harmless, and B does the work so carelessly or unskillfully as to injure a

> third party, A, as a general rule, is not liable. But when the contract is in its very nature and necessarily injurious to a third party, then the doctrine of respondeat superior applies. In such a case the injury does not result from the manner in which the work is done, but from the fact that it is done at all."

This has always been the law. See:

Pietryzk v. Dollar Steamship Lines, 31 Cal. App. (2d) 584 at 592, 1939 A.M.C. 1281.

> "As to seamen, that statute was made applicable by the Jones Act (46 Mason's U.S.C. sec. 688). Under neither of said statutes was the defense of independent contractor expressly abolished, nor do we find any language in either statutes which by implication has that effect as to incidental matters such as cleaning oil tanks."

See also the case of *Green v. Soule*, 145 Cal. 96, to the same effect.

The Court of Appeals for the Fourth Circuit refused to hold the work of stevedores to be so intrinsically dangerous as to impose liability upon the shipowner for the negligence of a longshoreman engaged in loading dynamite which exploded in the process of the work. *Joseph R. Foard Co. v. State of Maryland*, 219 Fed. 827 (C.A. 4).

The same result was reached in a case involving mining, *Laffery v. Gypsum Co.*, 83 Kan. 349, and a similar conclusion was arrived at in connection with the unloading of sheets of steel from a boxcar, *Union*

Tank & Supply Co. v. Kelley, 167 F. (2d) 811 (C.A. 5), and again this doctrine was announced in connection with the taking down of a building wall, *Engel v. Eureka Club,* 137 N.Y. 100, and use of a gasoline-fired steam generating machine, *Berman v. Greenberg,* 314 Mass. 540. See also *Carr v. Stevens,* 295 Fed. 701, wherein a fumigator using highly volatile fluids was held to be within the independent contractor rule.

In the cases of the type just cited the extraordinary degree of risk described as "intrinsic danger" has been held to be absent; without detailing them again, we think it is obvious that the facts of the present case bring it within this latter category.

THE SHIELDS CASE.

We respectfully cite to this Court the case of *Shields et al. v. United States,* 73 F. Supp. 862; 175 Fed. (2d) 743 (C.A. 3); cert. denied 338 U.S. 899. The facts of that case were much stronger in favor of the seaman than is the factual situation in the matter at bar. While Shields and the petitioner were injured in the same manner, there were additional specifications of negligence proved in the *Shields* case which are absent in the instant case. In the *Shields* case there had been certain allegedly defective winch handle extensions rigged and placed in operation by the longshoremen and it was claimed that this arrangement made it dangerous for a man at work oiling the

winches because the winch operator would not be likely to see him. *Shields v. U.S.*, 73 Fed. Supp. 862.

No such claims, however, were made in the matter at bar, and eliminating these specifications of fault contained in the *Shields* case, the *Shields* case is on all fours with the matter at bar.

> "On the morning of the third day of his [oiler] employment, while he was oiling the port winch at #2 hatch, the machinery was prematurely started by the winch operator, an employee of the stevedore * * *." *Shields v. U.S.*, supra.

In the *Shields* case, there were individual shutoff valves at each winch, as there were in the case at bar. In this connection, the learned District Judge stated as follows:

> "(7) *It is, of course, a breach of the employer's duty to put a man to work in an unsafe situation over which the man has no control. It is an entirely different thing when the workman has it in his power to make the place safe by a simple and ordinary precaution. The employer's duty must be measured by commonly accepted standards. Work has to be done on pieces of machinery of various types, particularly electrical apparatus, which are extremely dangerous unless they are rendered 'dead' by pulling a switch or closing a valve. In such cases the employer's duty to furnish a safe place to work is fully met if the switch or valve is there and the man knows how to use it—in other words, if the employer has supplied a reasonable and safe method of making the work perfectly safe. The fact that someone*

> *other than the workman can create a danger unless the workman takes the normal steps to make the machine safe does not make the employer responsible.*" (Emphasis supplied.)

Before arriving at the above-quoted conclusion and, thusly, dismissing libelant's libel, the Court had before it the case of *Seas Shipping Company v. Sieracki,* supra, to which appellant has devoted so many pages of his brief and which decision Judge Lemmon also carefully considered in the case at bar and held it to be inapplicable (Tr. 26-29A).

Affirming the District Court, the Court of Appeals in the *Shields* case reviewed the facts and the law and ruled as follows:

> "Appellant's main point is that appellee violated its duty in allowing the work to be done in a dangerous fashion and in failing to provide a safe place. We agree that the ship owner's responsibility to furnish a safe place for the crew continues through any hazard created by longshoremen in loading the cargo and engaged by the owner for that purpose. In this connection, as the district judge stated, the method employed by the stevedores in operating the deck winches, if considered by itself, might well be thought dangerous to Shields in his job. The difficulty is that each winch on the deck of the 'Hamlin' had a valve controlling the steam which powered the motor. Shields knew this; specifically he knew that shutting the steam off by turning the valve put the winch out of operation and he frankly stated that he had the right to shut off the steam

if necessary in order to oil the winch. He did not shut off the steam to the forward port winch, the one which hurt him, prior to oiling it. Fifteen minutes prior to the accident, the operator of the starboard winch at Shields' direction, had shut off the power while Shields oiled it. In the situation we think it obvious that the district judge was correct in concluding that:

"3. *The respondent did not fail in any duty to supply a safe place for the libellant to work. The method of operating the winch adopted by the longshoreman did not render the place where Shields was working unsafe nor make it dangerous for him to oil the winch, so as to place any liability in respect of it upon the respondent.*'" (Emphasis supplied.)

Even the dissenting opinion by Chief Judge Biggs of the Court of Appeals held that Shields in failing to close the valve controlling the steam supply to the winch was guilty of negligence, but would impose some measure of liability on the shipowner because of the defective winch handle extensions, a factual situation which was not present in the matter at bar.

This Court denied certiorari in the *Shields* case, 338 U.S. 899, and that case being squarely in point, is completely controlling in the matter at bar.

CONCLUSION.

From the foregoing, it is respectfully submitted that the petition for the writ of certiorari should be denied.

Dated, San Francisco, California,
July 26, 1950.

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